UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

SCHNELLECKE LOGISTICS ALABAMA, LLC	)	
	)	
and	)	**Case 10-CA-199183**
	)	
DONALD EDWIN BUSSEY III, AN INDIVIDUAL	)	
	)	
SCHNELLECKE LOGISTICS ALABAMA, LLC	)	
	)	
and	)	**Case 10-CA-199732**
	)	
LASHOAN THOMAS, AN INDIVIDUAL	)	
	)	
SCHNELLECKE LOGISTICS ALABAMA, LLC	)	
	)	
and	)	**Case 10-CA-201235**
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKS OF AMERICA (UAW) REGION 8	)	

RESPONDENT'S REPLY TO OPPOSITION TO MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND DISQUALIFICATION

Schnellecke Logistics Alabama, LLC ("Schnellecke" or "Respondent") replies[1] as follows to Counsel for the General Counsel's Opposition to Schnellecke's November 13, 2017 Motion to Dismiss:

1. The Counsel for the General Counsel's Opposition acknowledges, in a footnote (see GC's Opp., p. 4 n.4), the significance and timeliness of the issues raised by Schnellecke in its Motion to Dismiss: the status of Administrative Law Judges (ALJ) under the Appointments Clause of the United States Constitution appears headed for *certiorari* review at the Supreme

[1] Schnellecke's reply is filed pursuant to §102.24 (c) of the Board's Rules and Regulations.

Court in light of the recent decisions in Burgess v. FDIC, 871 F.3d 297 (5th Cir. 2017) and Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016). These two decisions represent a "sea change" in the law and opened up a new circuit split.

a. The Fifth Circuit in Burgess issued an interlocutory ruling suggesting that Federal Deposit Insurance Corporation (FDIC) ALJs are, in fact, "inferior officers" subject to the Appointments Clause. The Counsel for the General Counsel points out that the D.C. Circuit, in Landry v. FDIC, 204 F.3d 1125 (D.C. 2000), had previously held the opposite. (See GC's Opp., p. 8 n.8.)

b. Likewise, the Tenth Circuit in Bandimere held that Securities and Exchange Commission (SEC) ALJs are "inferior officers" subject to the Appointments Clause. The D.C. Circuit in Raymond J. Lucia Cos. v. SEC, 868 F.3d 1021 (D.C. Cir. 2017) (per curiam), faced an evenly-divided *en banc* panel, which, by virtue of the tie, denied review of the SEC's finding that its ALJs are not "inferior officers." (See GC's Opp., p. 8 n.8.)

c. Both Burgess and Bandimere are well-reasoned decisions, and the General Counsel's Opposition does not seriously contend otherwise. Moreover, seeing as the *en banc* D.C. Circuit is evenly split on whether ALJs are, in fact, "inferior officers," the argument enjoys substantial support.

2. Thus, contrary to the Opposition (see GC's Opp., pp. 5-14) and assuming the Burgess and Bandimere view prevails when the circuit split is resolved, it stands to reason NLRB ALJs are also "inferior officers," just as are FDIC ALJs and SEC ALJs.

a. As the Burgess court explained: "An FDIC ALJ has the broad authority to admit or exclude evidence, permit discovery and shape the course and scope of a contested hearing. Accordingly, the absence of final decision-making authority does not sufficiently

undermine FDIC's ALJs' 'significant authority' such that they are employees, rather than Officers." Burgess, 871 F.3d at 303 (footnote omitted).

b. The same is equally true for NLRB ALJs, notwithstanding the General Counsel's protestations that "decisions of NLRB administrative law judges have no legal significance ... – they bind no one." (See GC Opp., p. 14.)

3. The only remaining questions is whether the NLRB's ALJs are – unlike the SEC's ALJs – appointed by a "Head of Department," but the General Counsel does not offer a cogent explanation distinguishing the NLRB's appointment process from the SEC's process in Bandimere, where the SEC conceded that, although the SEC was a "Department," its ALJ, had not been appointed by the "Head of Department." See Bandimere, 844 F.3d at 1171.

4. The General Counsel also argues that any defect in the ALJ's appointment can be "cured" through "ratification" (see GC's Opp., p. 18), but this fallback argument only underscores that there is a problem here.

a. Such "ratification" has not yet happened.

b. The cases[2] cited by the General Counsel are all premised on invalid appointments that had *already* been ratified. Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1190–91 (9th Cir. 2016), cert. denied, 137 S. Ct. 2291 (2017) ("The subsequent valid appointment, coupled with Cordray's August 30, 2013 ratification. . ."); Advanced Disposal Servs. E., Inc. v. N.L.R.B., 820 F.3d 592 (3d Cir. 2016) ("Board's *nunc pro tunc* ratification of all administrative, personnel, and procurement matters approved by Board or taken by or on behalf of Board when Board had lacked a quorum, Board's express ratification of appointment of

[2] Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998) has been superseded by Statute as Stated in Wilkes-Barre Hospital Company, LLC v. National Labor Relations Board, D.C. Cir., May 19, 2017.

Regional Director, and Regional Director's ratification of all actions he had taken during that period. . .); Fed. Election Comm'n v. Legi-Tech, Inc., 75 F.3d 704, 708 (D.C. Cir. 1996) ("Here, as the FEC points out, the constitutional violation, *which obliged us to dismiss the case in NRA*, has been remedied—or at least the FEC purported to remedy the defect.").

5. Accordingly, if the Burgess and Bandimere view prevails, Schnellecke's Motion to Dismiss should be granted.

WHEREFORE, Schnellecke asks that its Motion to Dismiss be granted.

/s/ Marcel L. Debruge
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed and a copy sent to the following via e-mail and/or U.S. Mail, on this the 27th day of November, 2017:

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